No. 80-2151

Office-Supreme Court, U.S.
FILED
JUL 31 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

STATE OF NEW JERSEY,
Petitioner,

-vs-

EDWARD RYAN,
Respondent.

On Writ of Certiorari to the New Jersey Supreme Court

REPLY BRIEF

JAMES R. ZAZZALI,
ATTORNEY GENERAL
OF NEW JERSEY
ATTORNEY FOR PETITIONER,
STATE OF NEW JERSEY,
STATE HOUSE ANNEX,
TRENTON, NEW JERSEY 08625

JOHN DE CICCO
ASSISTANT ATTORNEY GENERAL
DIVISION OF CRIMINAL JUSTICE
CN 24
13 ROSZEL ROAD
PRINCETON, NEW JERSEY 08540
(609) 452-9500
OF COUNSEL.

ROCKY L. PETERSON,
DEPUTY ATTORNEY
GENERAL,
ON THE PETITION.

THE SUPERIOR APPELLATE PRINTING COMPANY
P. O. BOX 363
CRANBURY, N.J. 08512
AREA CODE 609
443-4202

TABLE OF CONTENTS

	PAGE
INTRODUCTION	1
REASONS FOR GRANTING THE WRIT	2
POINT I	
THIS COURT SHOULD HEAR THE INSTANT MATTER BECAUSE THE NEW JERSEY SUPREME COURT DECISION RESTED EXCLUSIVELY UPON THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION	2
CONCLUSION	5

Cases Cited:

United Air Lines v. Mahin, 410 U.S. 623 (1973)	5
Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977)	4

Rules Cited:

R. 22.5	1

NO. 80-2151

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

STATE OF NEW JERSEY,
Petitioner,

vs.

EDWARD RYAN,
Respondent.

On Writ of Certiorari to the
New Jersey Supreme Court

REPLY BRIEF

INTRODUCTION

This brief is submitted pursuant to **R. 22.5** in reply to respondent's brief opposing Certiorari. Petitioner relies and incorporates herein the Statement of the Case and Arguments contained in its petition for certiorari.

REASONS FOR GRANTING THE WRIT

POINT I

THIS COURT SHOULD HEAR THE INSTANT MATTER BECAUSE THE NEW JERSEY SUPREME COURT DECISION RESTED EXCLUSIVELY UPON THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

In his response to the instant petition for certiorari, respondent asserts that this Court lacks jurisdiction over the instant subject matter. Specifically, respondent argues that the decision of the New Jersey Supreme Court that double jeopardy considerations militate against increasing a defendant's prison sentence after violation of probation when he has already served a portion of that custodial term was based on its interpretation of New Jersey Statutory law. Respondent's assertion is totally incorrect and unsubstantiated by the Court's opinion. The decision of the New Jersey Supreme Court was based entirely on federal constitutional law, and was not merely an interpretation of State statutory law. In

ruling in respondent's favor the New Jersey Supreme Court explicity adopted the following statement as the rationale for its opinion:

> Simply stated the contention is that jeopardy attached as soon as defendant commenced serving his prison term, hence principles of double jeopardy foreclosed the imposition of any increased term after violation of probation. We agree.

Indeed, respondent's answer to the instant petition focuses entirely on federal decisional law in attempting to refute New Jersey's position regarding the substantive issue involved in this case.

Similarly, respondent's insistence that the New Jersey Supreme Court found as a matter of state law that no State statute gave authority to the trial court to increase a defendant's sentence is not supported by the record below. No reference or citation to a state decision or statute in support of this position is made by respondent. This is particularly important

in light of this Court's opinion in Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977) where Justice White stated:

> Had the Ohio court rested its decision on both state and federal grounds, either of which would have been dispositive, we would have had no jurisdiction.
>
> But the opinion, like the syllabus, did not mention the Ohio Constitution, citing instead this Court's First Amendment cases as controlling. It appears to us that the decision rested solely on federal grounds. That the Ohio court might have, but did not, invoke state law does not foreclose jurisdiction here.
>
> Even if the judgment in favor of respondent must nevertheless be understood as ultimately resting on Ohio law, it appears that at the very least the Ohio court felt compelled by what it understood to be federal constitutional considerations to construe and apply its own law in the manner it did. In this event, we have jurisdiction and should decide the federal issue; for if the state court erred in its understanding of our cases and of the First and Fourteenth Amendments, we should so declare, leaving the state court free to decide the

> privilege issue solely as a matter of Ohio law. Id. at 568. (citations omitted).

Here, the New Jersey Supreme Court did not mention the New Jersey Constitution, citing instead this Court's Fifth Amendment cases as controlling. Clearly, the New Jersey Supreme Court felt compelled by what it understood to be federal constitutional considerations to construe and apply its own law in the manner it did. For these reasons, petitoner respectfully submits that assuming arguendo the decision below rests partly on State law, it does not create an adequate and independent state ground that relieves this Court of the necessity of considering the federal question. United Air Lines v. Mahin, 410 U.S. 623, 630-631 (1973).

CONCLUSION

For the reasons contained above and in the petition for certiorari this Court should grant this petition.

Respectfully submitted,

JAMES R. ZAZZALI,
ATTORNEY GENERAL OF
NEW JERSEY,
ATTORNEY FOR PETITIONER,
STATE OF NEW JERSEY.

BY: _____
John DeCicco,
Assistant Attorney
General

JOHN DECICCO,
ASSISTANT ATTORNEY GENERAL

OF COUNSEL.

ROCKY L. PETERSON,
DEPUTY ATTORNEY GENERAL,

ON THE PETITION.